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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1105

ABC AIR FREIGHT COMPANY, INC., ET AL., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents*.

BRIEF OF YELLOW FREIGHT SYSTEM, INC., GLOBAL AIR CARGO, LTD., GATEWAY TRANSPORTATION CO., INC., AND GATEWAY AVIATION, INC., RESPONDENTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: February 20, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
THE SENSE OF THE PETITION	2
NO HARM TO PUBLIC INTEREST	2
NO FIXED CONGRESSIONAL POLICY	3
NO VIOLENCE HAS BEEN DONE TO THE PROVISIONS OF THE ADMINISTRATION PROCEDURE ACT	6
CONCLUSION	10

CITATIONS

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	8
Air Freight Forwarder Authority, 40 C.A.B. 673 (1964)	4
Air Freight Forwarder Case, 9 C.A.B. 473 (1948)	4
Air Freight Forwarder Case (International), 11 C.A.B. 182 (1949)	4
Air Freight Forwarder Investigation, 21 C.A.B. 536 (1955)	4
Columbia Broadcasting System v. United States, 316 U.S. 407 (1942)	8, 9
Gardner v. Toilet Goods Asso., 387 U.S. 704 (1967)	8
Layne and Bowler v. Western Wellworks, 261 U.S. 387 (1923)	3
Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41 (1938)	8
Rice v. Sioux City Cemetery, 349 U.S. 70 (1954)	3
Southern Power Co. v. North Carolina Public Serv. Co., 263 U.S. 508 (1924)	3
U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956)	8, 9

STATUTES AND RULES:

Administrative Procedure Act 5 U.S.C. § 553, 556(a), 557(a) and (c)	7, 8
Federal Aviation Act of 1958 § 408(a)(5), (49 U.S.C. § 1378)	6

MISCELLANEOUS AUTHORITIES:

Conference Report No. 91-426, 91st Congress. 1st Session (Advance Sheet No. 8, U.S. Code Congressional and Administrative News, September 20, 1969)	5, 6

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INTRODUCTION

Come now Yellow Freight System, Inc., Global Air Cargo, Ltd., Gateway Transportation Co., Inc., and Gateway Aviation, Inc., respondents in the above-styled proceeding, and respectfully submit their brief in opposition to the petition for a *writ of certiorari* to the United States Court of Appeals for the Second Circuit.

THE SENSE OF THE PETITION

The petition urges three arguments for the issuance of the writ of certiorari. It is alleged:

1. The entry of long-haul truckers into air freight forwarding will be hurtful to the public interest.

2. There is a fixed Congressional policy which has been violated.

3. Approval by the court below of the decision by the Civil Aeronautics Board circumvents and undermines the Administrative Procedure Act.

None of the foregoing allegations constitutes reason for granting the writ.

NO HARM TO PUBLIC INTEREST

Although the petitioners urge considerations of the public interest to support their argument against the entry by the long-haul truckers into air freight forwarding, the plain goal of petitioners is insulation against competition. They were fully answered by the Board when it observed that it has long interpreted the statutory provisions under which it operates as signifying the recognition by Congress "that the Board's duty towards air cargo is to protect competition—not competitors" (A.21). Moreover, the Board found that the existing air freight forwarders cannot adequately provide the diligent efforts needed to generate air freight from wider and more diverse sources (A.26-27). The Board chose, however, to authorize a limited number of trucker air freight forwarders in a controlled experiment to insure that the competition thus introduced would not become hurtful to the public interest (A.35-36). The court below, on review, accepted as sincere the Board's plans for the controlled experiment and sustained its decision (A.11-13).

Under the foregoing circumstances, the Supreme Court should not concern itself with the factual findings respecting need for and impact of the proposed authorizations. *Southern Power Co.* v. *North Carolina Public Serv. Company,* 263 U.S. 508 (1924). Neither should the Court concern itself with the private interests of the litigants before it, *Layne and Bowler* v. *Western Wellwork,* 261 U.S. 387 (1923); *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1954). Possible injury to the petitioners as a result of new competition is not a justiciable issue at this stage of the cause.

NO FIXED CONGRESSIONAL POLICY

Although the central concept of the petition is that the authorization of the Board, sustained by the court below, of the three successful motor carrier applicants to engage in air freight forwarding is violative of an established Congressional policy against surface carriers controlling or themselves becoming air freight forwarders, there has been no demonstration whatever that such a policy actually exists. In the very decision of the Board on remand, which the court below sustained, the Board specifically and categorically denied that there is any such Congressional policy (A.18-21). The petition tries hard to read a contrary meaning into the first opinion by the court below, but the most that was there said is that an *agency* policy of granting surface carriers air freight forwarding authority only after a rather special showing had not been "wholly agency determined but is a radiation from a direction of Congress" (A.102).

The foregoing is a far cry from a definitive holding that there is a Congressional policy of exclusion of surface carriers from the air freight forwarding field. In-

deed, the very observation of the court below that the Board had in the past granted air freight forwarder authorizations to surface carrier interests only when satisfied as to the competitive impact of so doing is itself a denial of the concept that there is a Congressional policy against such entry. The decision of the Board upon remand traced the history of its treatment of surface carrier interests in the various air freight forwarder cases (A.22-24). In the first of those cases, *Air Freight Forwarder Case,* 9 C.A.B. 473 (1948), the Board had denied the applications of railroad affiliates, although it had issued appropriate authorization to motor carrier affiliates as well as to the affiliates of surface freight forwarders. In the companion proceeding, *Air Freight Forwarder Case (International),* 11 C.A.B. 182 (1949), the Board issued authorizations not only to affiliates of motor carriers and surface freight forwarders, but also to affiliates of the railroads as well. In its 1955 case, *Air Freight Forwarding Investigation,* 21 C.A.B. 536 (1955), the Board opened up the field of air freight forwarding to affiliates of the railroads and, finally, in *Air Freight Forwarder Authority* case, 40 C.A.B. 673 (1964), the Board again rejected the argument that there is a presumption against granting freight forwarding authority to applicants having direct surface transportation interests, holding instead that denial of entry would be ordered only where it appeared that conflicts of interest would arise so as to result in material diversion of traffic from air to surface and deprive the applicants of incentive to promote and develop air freight forwarding.

Even a casual inspection of the Board's pronouncements on the agency policy, which the court below in its initial opinion found to exist, is convincing that the

only relevant feature of any such policy is the desire on the part of the Board to promote air commerce. Absent the likelihood of a tendency to divert other traffic from movement by air, authorizations have been granted to motor carrier interests if the operating plan has satisfied the Board that it will generate air freight. The Board itself has summarized the trend of its regulation of the air freight forwarding industry as a narrowing of the shield of protection so as to allow increased competition from surface interests (A.23).

The Board's administrative policy has received tacit Congressional approval, as was suggested by the opinion of the Court below in its discussion of the significance of Public Law 91-62, Section 1(2), August 20, 1969, 83 Stat. 103, Amending Section 408(a)(5) of the Federal Aviation Act (A.7). That amendment authorized the Board to exempt any acquisition of a noncertificated carrier from the requirement of approval "to the extent and for such periods as may be in the public interest." The Conference Report No. 91-426, 91st Congress, 1st Session (Advance Sheet No. 8, U.S. Code Congressional and Administrative News, September 20, 1969) plainly shows that the only Congressional policy against participation by surface carriers in air operations is limited to those air activities which involve regulated functions as direct air carriers. Indeed, the Senate bill (S.1373) would have left to the Board's discretion whether or not to exempt from the requirement of prior approval acquisitions of any kind or class of air carrier and, in addition, would have permitted the Board to establish such expedited procedures as it deemed appropriate in those cases where it deemed its prior approval necessary. The House amendment, as recited in the Conference report, limited

the Board's authority "to exempt acquisitions from prior Board approval to acquisitions of noncertificated air carriers (such as air taxis and airfreight forwarders)" (Advance Sheet #8, U.S. Code Congressional and Administrative News, 91st Congress, 1st Session, page 1221). The House version was adopted and became law. By that action the Congress of the United States placed its stamp of approval upon the Board's prior administration of the provisions of Section 408(a)(5) of the Federal Aviation Act of 1958 (49 U.S.C. § 1378). There is no Congressional policy against the entry of surface carriers or surface carrier affiliates into the air freight forwarding business.

NO VIOLENCE HAS BEEN DONE TO THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

Section III and IV of the petition urged that the court below failed to give effect to the provisions of the Administrative Procedure Act in reviewing the opinion on remand of the Civil Aeronautics Board. It may here be observed, however, that this thrust of the petition is directed solely to the rules and regulations promulgated by the Board to govern the administrative processing of the pending and yet to be filed applications by long-haul trucking interests for air freight forwarder authorization. As such, these two sections -and, indeed, the whole tenor of the entire petition are directed to the alleged consequences of a hypothetical mass invasion of the air freight forwarder field by trucking interests. Petitioners had vigorously urged in the court below substantially the same argument respecting the procedural rules and regulations even prior to their effectiveness and that court held that it would be premature to review such orders inasmuch as

petitioners could not be hurt prior to the time that the Civil Aeronautics Board had actually granted authorizations pursuant to the regulations. The petition here now says that this would place upon petitioners the impossible burden of following each application and opposing it (A.20). Yet if petitioners are to escape that burden, there would have to be an order entered which would preclude the filing of such applications on the ground that no further entry should be permitted. This is precisely what the Board said it was unwilling to do (A.18-24).

In light of the Board's holding that there is no Congressional policy requiring exclusion of surface carriers from air freight forwarding, the Board obviously must make some provision for processing applications by long-haul trucking interests. Petitioners tacitly admit this but say that the regulations presage a policy of virtually free entry. This same argument (A.11-12) was answered by the court below by noting that it was unwilling to hold that the Board was insincere in its solemn statement that its policy would be one of monitored rather than free entry (A.18). The Supreme Court should be equally unwilling.

But the petition goes further. It urges that the holding of the Board that it will process both pending and future applications of long-haul trucking interests in accordance with the new regulations is an avoidance of the requirements of Section 8(b) of the Administrative Procedure Act. The section of that Act to which petitioners refer has been codified as Title 5 U.S. Code § 557(c). Apparently petitioners rest their argument upon the provision thereof requiring decisions by administrative agencies to state "(A) findings and con-

clusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof."

The cited section of the Administrative Procedure Act does not apply to rulemaking proceedings for which there is no requirement by statute that an adjudicatory hearing be held (Title 5 U.S.C. §§ 557(a), 556(a), and 553). Even were it otherwise, there would be no warrant for interposition of a court at this stage of the Board's effort to perform its statutory duty. As the court below pointed out (A.12), there has been entered no order of the Civil Aeronautics Board by which petitioners are required to do anything they have not previously done or to refrain from doing anything they were previously permitted to do, citing *Myers* v. *Bethlehem Shipbldg. Corp.*, 303 U.S. 41 (1938); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) and *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 704 (1967).

The petition ignores the very heart of the principle upon which the court below predicated its holding that insofar as the procedural regulations of the Board are concerned, the case is not ripe for review. With no effort to distinguish the cases relied on by the court below, the petitioner cites only *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942) in which the Court held that regulations looking toward the licensing of radio stations were reviewable upon the petition of a chain broadcasting company.

The *Columbia Broadcasting* case was interpreted by the Supreme Court itself in *U. S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), when at page 199 of its

opinion, the Court quoted as follows from its opinion in the earlier case:

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and busineess relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked."

The principle of the *Columbia Broadcasting* case was followed in the *Storer Broadcasting* case where it was held that regulations promulgated by the Federal Communications Commission to fix the maximum number of broadcasting stations in which any one person might own an interest raised an issue by which Storer was aggrieved inasmuch as it had already achieved that number and would be prevented by the regulation from acquiring additional interests in the future. Storer was, therefore, said the Court, clothed with status to bring into issue the lawfulness of the rules and regulations.

In the instant case the regulations of the Board do not in any way impinge upon the present operations or obligations of the petitioners. At most, they suggest that new competition will be injected into the field now occupied by petitioners. But until that new competition has been authorized by affirmative action of the Civil Aeronautics Board, petitioners are not aggrieved and cannot invoke the provisions of the Administrative Procedure Act respecting court review of agency action.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari lacks merit and should be denied.

Respectfully submitted,

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February 20, 1970